The

ORPORATION JOURNAL

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bed by The Corporation Trust Company and Associated Companies

64 — AND NOT A THOUGHT OF RETIRING

CT goes into its 65*th* year with the same determination it held in December 1892:

- to provide the *best* in corporate service.
- to provide the *most* in corporate service.
- to be *alert* in developing new services and work aids which will make the task of every lawyer handling corporation matters easier, surer.

The
CORPORATION JOURNAL

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DECEMBER 1956—JANUARY 1957

Contents

Recent Decisions

GOT THAT FUNNY FEELING ?

Feel something creeping up on you from the rear?

It's probably the spectre of those annoying, time-consuming, routine-disturbing, patience-shattering details to be handled at your 1957 meeting of stockholders.

They will be on you before you know it.

Plan now to avoid all the nuisance. Delegate the fuss, bother and responsibility to CT. The nearest CT office will explain how easily it can be done.

what constitutes doing business

Field Warehousing

FIELD WAREHOUSING is a financial technique developed to aid manufacturers in securing working capital from banks. It was defined in a decision rendered some years ago as "warehousing the owner's goods on the premises of the owner or of the former owner." [1]

Approval of the legal effectiveness of this type of activity was indicated by the Supreme Court of the United States in *Union Trust Company and Security Warehousing Company v. Wilson,* 198 U. S. 530. There the court upheld the validity of warehouse receipts, pledged to secure loans, which represented property stored on a portion of the owner's premises which had been leased to a warehouse company, the premises leased being accessible only to the warehouse company and posted as being occupied by the company as a public warehouseman.

The scope of such activities frequently includes the issuance of "warehouse receipts" to banks which effect loans to the owner upon the guaranty of the warehouse company, which has the legal custody of the goods, that the volume and value of the merchandise will be maintained at an agreed level,[2] the warehouse corporation receiving a fee for its services.

There can be little doubt that where a warehouse company carries on such activities in a state other than that in which it is incorporated, it is to be regarded as "doing business" there so as to be required to be qualified as a foreign corporation, since it is carrying on its ordinary business in that state, being present there through those employees or agents who act for it and through its custody of the goods of others, for which it assumes responsibility and thus receives remuneration for activity carried on within the state.[3]

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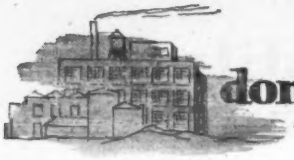
[1] *American Can Co. et al. v. Erie Preserving Co. et al.,* 183 Fed. 96.

[2] "There are many cases upholding the validity of the so-called 'field storage' system for the warehousing of heavy or bulky material, the actual moving of which is inexpedient. In such cases it has been held that if the warehouseman fully discharges his duty to negative ostensible ownership by the pledgor, withdrawal and substitution will not destroy the lien. *Philadelphia Warehouse Co. v. Winchester,* 156 Fed. 600; *First National Bank v. Pennsylvania Trust Co.,* 124 Fed. 968; *Bush v. Export Storage Co.,* 136 F. 918; *Fidelity Ins., Trust & Safe-Deposit Co. v. Roanoke Iron Co.,* 81 F. 439." *Manufacturers Acceptance Corp. v. Hale et al.,* 65 F. 2d 76.

[3] As was said in *Royal Insurance Co. v. All States Theatres,* 6 So. 2d 494: "It is established by well considered general authorities that a foreign corporation is doing, transacting, carrying on, or engaging in business within a state when it transacts some substantial part of its ordinary business therein. 20 Corpus Juris Secundum Corporations. Sec. 1829, p. 46."



domestic corporations

DELAWARE

Indemnification denied officer and director where litigation which was defended involved him in his personal and not official capacity, under employment agreement entered into before he became an officer and director.

Plaintiff, as a former officer and director of defendant corporation, sued for fees and expenses paid his attorney in defending two lawsuits brought against the corporation and plaintiff, among others, while he was a director, under a corporate by-law which purported to indemnify officers and directors for expenses incurred in defense of any suit "by reason of his being an officer or director of the corporation."

In ruling against plaintiff, the United States District Court, D. Delaware, found that relief in the litigation had been sought against plaintiff personally and in his individual capacity, and that an employment contract, which plaintiff sought to uphold in both actions, involved an agreement entered into prior to the time he became an officer and director of defendant. The causes of action in the suits involving the plaintiff were, therefore, regarded as "outside the ambit of the indemnification provisions of defendant's by-laws."

Sorensen v. The Overland Corporation, 142 F. Supp. 354. James R. Morford of Morford & Bennethum, of Wilmington, for plaintiff. Edwin D. Steel, Jr., of Morris, Steel, Nichols & Arsht, of Wilmington, for defendant.

Chancery court rules on apportionment of proceeds from corporate liquidation by trustees.

Plaintiffs, trustees under a will, sought instructions as to payment of equitable and trust income to life tenants, and as to how they should apportion, as between capital and income, the proceeds derived from the liquidation of a corporation, stock in which was received by them as a part of the residue of the testator's estate. Defendants were the life tenants and remaindermen who benefitted under various contingencies set forth in the trust. The issues to be decided were concerned with rights of life tenants to net income of the trust property, as opposed to the rights of remaindermen to have principal preserved.

The Court of Chancery, New Castle County, after an examination of the terms of the will, noted that there was no Delaware decision dealing with apportionment into principal and income of proceeds arising on a corporate liquidation. The court, however, referred to a 1913 decision, *Bryan v. Aiken*, 10 Del. Ch. 446, 86 A. 674, in

which the Supreme Court of Delaware made it clear that in its opinions net earnings no matter when accumulated and no matter how treated during the period of their accumulation "if declared as dividends out of net profits during the life tenancy, are given to the life tenant when declared, whether such dividends are made in cash or capital stock, provided that the principal of the trust is not diminished thereby." Applying the rule in this decision and the applicable statutory law, the Chancery Court concluded (1) that income payable to life beneficiaries of the trust from the date of the testator's death until the date of the creation of the trust was to be computed by the trustees on the basis of stock valuations approved by the court; (2) dividends of the company properly declared after the date of the creation of the trust and prior to corporate liquidation were payable to the life tenants; (3) liquidation proceeds paid over to the trustees which found their source in net earnings of the company were payable to the life tenants of the trust. The separation of the proceeds of the corporate property in liquidation into "permanent" capital assets as augmented by natural growth, the proceeds of which were to be preserved for remaindermen, as opposed to current assets payable to the life tenants, was reserved by the court for such further proceedings as might be necessary fairly to make such division within the rule of *Bryan v. Aiken.*

Steel et al. v. Steel et al., Court of Chancery, New Castle County, August 30, 1956. John J. Morris, Jr., of Wilmington, for plaintiffs. James M. Tunnell, Jr., of Georgetown, for Elizabeth T. Short, a defendant. Caleb S. Layton and Aaron Finger of Wilmington, for Elizabeth Short Hastings, Annie Short Elliott, Delia Short McCune and Mary Short Day, defendants. Edwin D. Steel, Jr., of Wilmington, pro se as a defendant and for Jennie M. Steel, a defendant. Louis J. Finger of Wilmington, for Aaron Finger, guardian ad litem of the unborn issue of Edwin de Haven Steel, Jr., a defendant.

Bank, a pledgee of stock fraudulently transferred to pledgor, lodged with it as security for defaulted loan, ruled not entitled to counsel fees, although entitled to stipulated interest on unpaid balance from date of default to judgment.

In *Haas v. Haas et al.,* 119 A. 2d 358, (The Corporation Journal, February—March, 1956, page 185), the Court of Chancery, New Castle County, held that a bank, which sold the stock of a Delaware company which was pledged with it as security for a defaulted loan, under circumstances where the certificates had been fraudulently transferred to pledgor, had, as pledgee, an equitable claim for the purchase price of stock, when it was returned by the bank's broker. That court has subsequently ruled that the bank, as pledgee, would be in the position of an assignee from a bona fide purchaser, at least up to the full amount of its loss, but would not be entitled to reimbursement for counsel fees, although entitled to the stipulated interest on the unpaid balance of the loan from the date of default until the date of judgment.

Haas v. Haas et al., 124 A. 2d 7. Thomas Herlihy, Jr., and Herman Cohen of Wilmington, for plaintiff. Caleb S.

Layton of Richards, Layton & Finger of Wilmington, for defendant General Motors Corporation. James R. Morford of Morford & Bennethum of Wilmington, for intervening defendant. Leon V. Haas and Grace Haas failed to appear and default judgments were entered against them.

MARYLAND

Preferred stockholders denied right to enforce charter provision calling for redemption within a certain time where corporation would be rendered insolvent by such action.

Plaintiffs sought to compel the defendant Maryland corporation to redeem its entire issue of preferred stock held by the plaintiffs. A decree was entered for the corporation, whereupon an appeal was taken by the plaintiffs to the Court of Appeals of Maryland.

The facts revealed that the defendant was organized in 1952 primarily to acquire an apartment property which was in serious financial difficulties. In practical effect, the court noted, the transaction was a complete refinancing of the property. The articles contained a provision that the original preferred stock issue was to be redeemed over a period of three years. The stock was never redeemed and the plaintiffs contended that there was an obvious default in the obligation to redeem, which a court of equity should enforce.

In affirming the decision of the Chancellor, the Court of Appeals of Maryland observed: "The obligation to redeem was at all times subject to the implied condition that it would not render the corporation insolvent in the sense that it would be unable to meet its debts as they mature in the usual course of business." The court noted that the complainants had not controverted the conclusion of the Chancellor that "the accountants' reports fully support the allegations of the answer that at no time since its incorporation, has the company had cash or other available assets sufficient to redeem its preferred stock without rendering it unable to meet its debts as they mature in the usual course of business."

Kraft et al. v. Rochambeau Holding Company, Inc., 123 A. 2d 287. Arnold H. Ripperger and Abram C. Joseph of Baltimore, for appellants. J. Wallace Bryan and Justinus Gould of Baltimore, for appellee.

NEW YORK

Factor in determining right to appraisal of stockholders dissenting to merger held to be purchase prior to date, following directors' adoption of plan and call of stockholders' meetings, when wide publicity was given to details of plan of merger.

A corporation into which another corporation had been merged brought this proceeding to determine which, if any, of the respondent dissenting stockholders of the corporation which had been merged into it, were entitled to have their shares appraised under Section 21 of the Stock Corporation Law

and to appraise the value of any shares so entitled. A principal question concerned the determination of the date upon which stockholders of the merged corporation were to have been presumed to have purchased their stock with knowledge of the plan of merger.

The New York Supreme Court, Special Term, Part I, fixed this cut-off date as the date, subsequent to the adoption of the plan by the directors of both companies and the calling of special meetings of stockholders to vote on the plan, which date was the day on which "a detailed statement regarding the merger, including its terms, was given over the Dow Jones ticker and later in the newspapers."

Matter of Dynamics Corporation of America, 152 N. Y. S. 2d 807.

Answer held required to be filed in minority stockholders' derivative suit to restrain execution of directors' agreement granting president option to buy shares at less than market price.

Plaintiff minority stockholders, in this derivative action, sought to restrain the execution of an agreement whereby defendant corporation granted to its president on option to buy up to 25,000 shares of its stock at $54 per share during a period of five years. They alleged the option was a gift, without consideration and that the agreed price was inadequate and less than the market price "during the period since the option was granted." They also claimed the corporation was being deprived of an opportunity to sell the same stock at a higher price.

The New York Supreme Court, Special Term, New York County, Part III, concluded that sufficient facts had been alleged to require an answer to be filed and denied motions to dismiss the complaint and causes of action.

Sorin v. Shahmoon et al., 152 N. Y. S. 2d 521. Lewis & Mound (Milton N. Mound and Shirley Fingerhood, of counsel), of New York City, for plaintiffs. Shatzkin & Cooper of Brooklyn, (Ivan A. Ezrine of Rock Hill, of counsel), for defendants.

TEXAS

Trust company held empowered to enter into a limited partnership agreement with an individual, related to trusts created by the individual, under which the trust company was trustee.

The relator, a Texas trust company, applied for a writ of mandamus requiring the Secretary of State to receive and file an instrument creating a limited partnership between it and an individual. This individual had previously named the trust company, under three separate trusts, as trustee for his three children, separately. Articles of limited partnership were executed between the individual, as general partner, and the trust company as limited partner in its separate capacity as trustee for each of the three income trusts. Each of the three trusts was to receive 10% of the profits of such proposed limited partnership. The Secretary of State had refused to file the instrument creating the limited

partnership, alleging lack of authority on the part of the trust company, under its charter, and, as a corporation, to enter into such a limited partnership agreement.

The Supreme Court of Texas granted the writ. While it emphasized that it was the settled law of Texas "that a corporation may not enter into a partnership for the reason that such action is contrary to public policy," the court also noted that the charter provisions of the trust company specifically granted it the right to act as trustee under any lawful express trust. The court observed that while the Texas Uniform Limited Partnership Act used the word "person" or "persons," there was no language in it excluding a corporation from the meaning of the word "person." It was, therefore, held that "a corporation legally qualified under appropriate statutory provisions to act as a trustee may enter into a limited partnership organized to carry out a lawful purpose." The court pointed out that, in becoming such a partner, control of the corporation would not be removed from the statutory officers and directors, as the only control exercised by a member of a limited partnership would be, under these circumstances, over the assets of the trust, and that only the assets of the various trusts would be in the limited partnership.

Port Arthur Trust Company et al. v. Muldrow, Secretary of State, 291 S. W. 2d 312. Rutan, Phares, Hale & Flowers of Port Arthur, for relators. John Ben Shepperd, Attorney General, Will D. Davis and William H. Clark, Asst. Attorneys General, for respondent.

foreign corporations

ARKANSAS

Local gasoline distributor for foreign oil company ruled agent for purposes of service of process.

The appellee oil company manufacturing gasoline and allied products in El Dorado, Arkansas, distributed these in the Fort Smith area of that state through a warehouse or bulk station operated by the person in charge, who was served as appellee's agent. He received the goods on consignment, with the title remaining in the company. The Supreme Court of Arkansas, after an examination of the contract between the distributor and the company, observed that the court was required to be guided by what control the company was empowered to exercise over the person served, rather than what power the company actually did exercise. It concluded that the relationship of agency existed between the parties, resulting from the contract and the dealings between them, rejecting a contention that the distributor was an independent contractor. The trial court was directed to overrule the company's motion to quash the service of process upon it.

Arkansas Independent Oil Marketers Association, Inc. v. Monsanto Chemical Company, 284 S. W. 2d 127. Tom Gentry of Little Rock, for appellant. Davis & Allen, H. D. Dickens, of El Dorado, for appellee.

MASSACHUSETTS

Foreign corporation, having resident salesman in state whose activities were regular and substantial in soliciting orders, ruled doing business and subject to process.

In an action for patent infringement the defendant moved, among other things, to quash the service. The defendant was a New York corporation dealing in auto parts and accessories. It maintained a sales representative living in Boston whose activities were "regular and substantial" who solicited orders on commission only—all orders being accepted and filled in New York. The sales representative received complaints and rendered some assistance in adjusting them. He occasionally carried samples and gave demonstrations and distributed catalogues and promotional material. He also made some collections from delinquent accounts.

From the facts, the United States District Court for the District of Massachusetts found that the defendant was doing business in Massachusetts and was subject to process. The motion to quash the service was denied.

Denis et al. v. Perfect Parts, Inc. et al.,* United States District Court, District of Massachusetts, May 2, 1956. W. R. Hulbert, William W. Rymer, Jr., Fish, Richardson & Neave of Boston, for plaintiff. Harry Price of New York City and A. W. Wunderley (of counsel) of Boston, for defendant.

* The full text of this opinion is printed in the **State Tax Reporter**, Massachusetts, page 10,078.

Unlicensed foreign corporation which negotiated for sale of machinery located in another state, by mail and telephone, ruled not subject to service made upon Commissioner of Corporations and Taxation under statute.

In an action for breach of warranty, in connection with the sale of certain machinery, brought by the plaintiff Massachusetts corporation against the defendant New Jersey corporation, the defendant unlicensed corporation moved to dismiss the action or in the alternative to quash the return of service upon it. Service was made upon the Commissioner of Corporations and Taxation under the provisions of Massachusetts G. L. Ch. 181, Sec. 38, which provides for service on the Commissioner as attorney for a foreign corporation doing business in Massachusetts only "in relation to any cause of action or proceeding arising out of such business."

The United States District Court, District of Massachusetts, noted that the cause of action arose out of a sale of machinery at a time when the defendant's only connection with Massachusetts was that it advertised in nationally circulating magazines distributed in the state. The negotiations leading to the contract were made by mail and tele-

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A. What information sources do you and the officers of your corporation client rely upon to determine (1) that the corporation is filing every state tax report and paying every state tax to which it is subject, (2) that it is not paying taxes to which it is not subject, (3) that it is not paying a larger tax than that to which it is subject?

B. Is the information you get complete enough, dependable enough so you can confidently make any required interpretation of statutes?

C. Does the individual responsible for preparation of the company's tax returns have authoritative, background information to which he can refer for help—such as sample, filled-in forms?

D. Are reports prepared and taxes paid by rote—or with an eye open for new developments and information which might mean a reduction in the company's tax bill?

E. Has the corporation ever had its license cancelled, or paid a fine for failure to pay a tax or file a return?

WYERS

P O

issue)

F. If a new tax was imposed or a rate changed or a due date was revised or a new state tax official was designated to receive a return how would the individual preparing the return get that information?

G. Would it not increase your client's internal efficiency to have a separate C T Notification Bulletin—containing full information about each state tax and each state tax report to which the corporation may be subject—coming to the right man's desk at about the time work should be started on each requirement?

H. Wouldn't you be more confident knowing that a Special C T Notification Bulletin will be sent to the man you have designated every time an important new state tax law which might affect the corporation is enacted—or there is a significant amendment to an already-existing requirement?

I. Wouldn't all the problems of state taxes be easier to solve with a loose-leaf, fresh-as-a-minute State Tax Reporter handy for reference?

J. Wouldn't your client be safer, wouldn't you be surer with the C T System of Corporate Protection—especially when changing over to C T can be accomplished so easily, so quickly?

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phone and the contract itself was completed in New Jersey by the defendant's acceptance of the plaintiff's order at its New Jersey office. It called for shipment of the machinery from New Jersey to Boston, f. o. b. Paterson, New Jersey. The court ruled that the cause of action did not arise out of business done in Massachusetts. "Section 3A," it remarked, "is by its own terms inapplicable to the present case, and the service of process made under it should be quashed." The defendant's motion to quash the return of service was allowed. The motion to dismiss was denied without prejudice, as the plaintiff appeared to believe it could make valid service under Mass. G. L. Ch. 223, Sections 37 and 38.

William I. Horlick Co., Inc. v. Bogue Electric Manufacturing Co.,* 140 F. Supp. 514. Sydney S. Epstein of Boston, for plaintiff. Howard Rubin of Boston, for defendant.

* The full text of this opinion is printed in the **State Tax Reporter**, Massachusetts, page 10,075.

MICHIGAN

Mere carrying on of conferences between officers of foreign corporation ruled insufficient to support service of process.

The question presented was whether defendant Canadian corporation, not licensed to do business in Michigan, was doing business there in such a way as to render it amenable to Michigan process. All of defendant's officers, except one, were Michigan residents, including its president, upon whom service was made in Michigan. Contracts were made in Canada by defendant's manager there, involving telephone calls from the president in Michigan, who may have signed papers in this country. The latter went to defendant's Canadian plant about once a month, entering into high-level discussions with the manager and the board of directors. At times he discussed in Michigan defendant's important problems with its manager and other officers and made decisions thereon in Michigan, and discussed defendant's business with its attorney and other officers in Michigan. Defendant's trucks came into the United States to pick-up equipment purchased there. Plaintiff contended these activities constituted doing business sufficient to subject defendant to Michigan process.

The Supreme Court of Michigan, in entering an order granting a motion to quash the service and to dismiss as to defendant corporation, observed that "in the instant case the actions relied on by plaintiff consist of those things done by defendant's officers in furtherance of their corporate relationships with each other which were incidental to defendant's inner operations." In conclusion, the court remarked: "For the purposes here under consideration a foreign corporation is doing business within the state when it engages in transactions with others, but not when its officers merely confer with each other and superior officers give instructions to those in inferior positions."

Zeidler v. Johnson et al.,* 77 N. W. 2d 756. John F. Langs, Richard F. Molyneaux, of counsel, of Detroit, for Progressive Welder Co. of Canada, Ltd. Samuel W. Lieb of Detroit, for appellee.

* The full text of this opinion is printed in the Michigan **State Tax Reporter**, page 10,414.

NEW YORK

Service upheld on unlicensed foreign corporation where there was shown continuity of commercial activity by corporation in Federal district.

The defendant, a Virginia corporation manufacturing cigarettes, not qualified to do business in New York, moved to quash the service of summons on it in an action on a contract, on the ground that it was a foreign corporation not doing business in the Southern District of New York. The United States District Court for the Southern District of New York noted that the defendant's products were sold in New York through independent distributors and that it employed the services of an independent premium redemption service in New York City but advertised that place on its coupons and gift catalogues as its Premium Department. For the past 18 years it maintained an employee and paid his office rent in New York City. This person, the one served with process, described himself in letters as the defendant's Regional Sales Manager. He visited the distributors of the defendant's products, advised them of displays, ran down complaints and removed stale cigarettes.

The court said: "While these affidavits do not fully account for all of the possible contacts they are sufficient to indicate a continuity of commercial activity within this judicial district to make it reasonable to have defendant make its defense in this forum." The defendant's motion to quash the service was denied.

Lane, Ltd. v. Larus & Brother Company, Incorporated, 140 F. Supp. 466. Nathan A. Markowitz of New York City, for plaintiff. DeWitt, Van Aken & Nast, (Thomas A. Diskin and William R. Lonergan, of counsel), of New York City, for defendant.

Service upon unlicensed foreign corporation, effected by serving agent of wholly owned subsidiary, upheld where subsidiary was regarded as managing agent of corporation.

The plaintiffs brought an action to recover for an alleged wrongful death by reason of an airplane crash in Brazil. One of the defendants, an unlicensed foreign corporation, moved to set aside and vacate the service of summons which was made upon it by serving the managing agent of its wholly owned subsidiary doing business in New York. The plaintiffs claimed that the subsidiary corporation was a managing agent of this defendant and that the service upon it was good as service upon a managing agent of the defendant pursuant to Subdivision 3, Section 229, Civil Practice Act. The question presented to the Supreme Court, Westchester County, was whether or not the subsidiary was a managing agent of the defendant at the time of service.

The court summed up the facts by noting that the subsidiary was in effect a sales agent for this defendant's products in foreign countries with its compensation for sales represented by discounts decided by the defendant; that it existed at the will of the defendant; that its function was to promote the defendant's products in the foreign market; that it performed functions

essential to the conduct of business by the defendant; and that it was subject to the complete domination of the defendant.

"A foreign corporation doing business here through a subsidiary," the court remarked, " should be readily amenable to the process of our courts, and, as a general proposition, if the subsidiary is the mere instrumentality of the foreign corporation, it should be held to occupy the status of a managing agent of the foreign corporation within the meaning of statutory provisions authorizing service of process upon a managing agent of a corporation." The court ruled that the subsidiary was the managing agent of the defendant and denied the motion to vacate the service against it.

Goodman et al. v. Pan American World Airways, Inc., et al., 148 N. Y. S. 2d 353. Theodore E. Wolcott of New York City, for plaintiff. John P. Smith (Allen M. Taylor, of counsel) of New York City, for defendant United Aircraft Corporation.

taxation

ALABAMA

State franchise tax ruled not applicable to common carrier pipe line company, having activities in state solely in furtherance of interstate commerce.

The Plantation Pipe Line Company, a Delaware corporation was successful in the lower court in having its business with respect to Alabama determined to be solely interstate commerce, to which the Alabama franchise tax did not apply. Upon appeal, judgment was affirmed by the Alabama Supreme Court. The corporation owned and operated a pipe line running from Baton Rouge, Louisiana, to Greensboro, North Carolina, with certain lateral lines, one of which in Alabama, was from Helena, Alabama, to Birmingham and Montgomery, Alabama. All of its activities in Alabama were found to be in furtherance of its interstate activities. The company never maintained any general or corporate office in Alabama, and at all times was a common carrier pipe line company within the meaning of the Interstate Commerce Act, operating solely under tariffs filed with the Interstate Commerce Commission.

*State v. Plantation Pipe Line Co.,** 89 So. 2d 549. John Patterson, Attorney General, Willard W. Livingston and William H. Burton, Assistant Attorneys General, for appellant. Cabaniss & Johnston and Jos. F. Johnson and E. T. Brown, Jr., for appellee. (*Petition for writ of certiorari filed in the Supreme Court of the United States, October 11, 1956; Docket No. 505.*)

* The full text of this opinion is printed in the **State Tax Reporter,** Alabama, page 778.

GEORGIA

Three-factor statutory income tax formula, including inventories as one of the factors, ruled not available to a taxpayer having no inventories.

Defendant in error, a corporation, sought in the lower court to recover a refund of income taxes paid for three years, based upon the use of a three-factor apportionment formula provided by statute for income derived "from the manufacture, production or sale of tangible personal property." The evidence showed that this company was engaged in the business of selling tangible personal property on its own account as principal, both in Georgia and in other states.

The Georgia Supreme Court, reversed a judgment in favor of the corporation. It ruled that the three-factor formula, involving average inventory ratio, salaries and wages ratio and gross receipts ratio, could be used only when the income attributable to the state was derived from the manufacture, production or sale of tangible personal property and when the corporation has or employs in its business activities all three of the factors comprising the apportionment formula. The corporate taxpayer had no inventories, and could not employ the average inventory ratio factor, since it purchased goods from another company which shipped the goods to the taxpayer's customers. The three-factor formula was, therefore, regarded as not available to it.

*State et al. v. Coca Cola Bottling Co.,** Georgia Supreme Court, September 7, 1956. Eugene Cook, Attorney General; Wm. L. Norton, Asst. Attorney General; Ben F. Johnson, Deputy Asst. Attorney General; Broaddus B. Zellars, Deputy Asst. Attorney General; H. Grady Almund, Jr.; Benj. B. Blackburn III, of Atlanta, for plaintiffs in error. Edward R. Kane, Jones, Williams, Dorsey & Kane, of Atlanta, for defendant in error.

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* The full text of this opinion is printed in the **State Tax Reporter**, Georgia, page 10,094.

LOUISIANA

Private operator extracting oil and gas from land leased from Federal government, ruled subject to state severance tax.

In the Federal District Court, appellant corporation was held subject to the Louisiana severance tax on oil and gas extracted from land leased from the Federal government. Upon appeal, the United States Court of Appeals, Fifth District, in affirming the judgment of the District Court, observed that the taxing statutes provided that the taxes were levied on all natural resources severed from the soil or water, to be paid by the owner at the time of severance. The court stressed the fact that the tax was expressly made to apply not while the oil or gas was in the earth, but when it was severed from its surface, and that it then obliged the person severing it to file a statement of his business and to pay the tax, remarking: "Only after it reaches and is severed from the surface and becomes personal property does the tax fall upon the severer." With respect to the fact that the severance occurred on land leased from the Federal government, the court concluded:

"In short, the provision must and will be construed so as to give it effect and as saying in effect that if, under the general laws of the state, the operator would be liable, he cannot draw around himself a cloak of immunity because the United States is lessor, but must, as a part of the consideration for the lease and his obligation under the statute, pay the taxes which the severance tax statutes impose."

*Mississippi River Fuel Corporation et al., v. Fontenot, Collector of Revenue,** 234 F. 2d 898. Clyde R. Brown of Monroe, Clarence L. Yancey of Shreveport, and C. McVea Oliver of Monroe, for appellants. John B. Smullin, Chief Counsel, Department of Revenue, Baton Rouge. (*Petition for writ of certiorari filed in the Supreme Court of the United States, September 12, 1956; Docket No. 409.*)

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* The full text of this opinion is printed in the **State Tax Reporter**, Louisiana, page 12,172.

TENNESSEE

Use of allocation formula, applied to combined earnings of in-state and out-of-state plants of plaintiff, upheld where business was found to be unitary.

The plaintiff Delaware corporation appealed to the Supreme Court of Tennessee from a decree holding it liable for additional excise taxes for the years 1950 and 1951. The plaintiff, a manufacturer of glazed clay sewer pipe and allied clay products with five plants in four states, filed its excise tax returns on the basis of applying the statutory formula to the earnings of its Chattanooga, Tennessee, plant only. The defendant refused to accept this method and applied the statutory formula to the combined earnings of all five plants of the plaintiff, taking the position that the plaintiff's business was unitary and not multi-form in character as the plaintiff maintained.

The record revealed that the Chattanooga plant manufactured everything it sold and sold everything it manufactured exclusively, in a five state area, through travelling salesmen hired and solely responsibile to the Chattanooga plant. Each plant had its own sales territory and there was no competition among the various plants. The expense of maintaining the general offices of the corporation was prorated among all the plants. The cost of converting the Chattanooga plant from coal to gas firing in its kilns, determined from the experience of the other plants by the central office, was borne by the plaintiff corporation and not by the Chattanooga plant alone. Machine shops maintained at each plant repaired equipment indiscriminately for one another. Where purchases were made by one plant from another, a fixed discount was allowed. The ultimate control of the sale price of the plaintiff's products remained with the central office, although each plant supposedly fixed its own sale price.

The court found that the unity of ownership, management and use sustained the right of the state to tax the plaintiff on the basis of an allocation formula. The business of the corporation was unitary, the court ruled, and the decree of the trial court was affirmed.

W. S. Dickey Clay Mfg. Co. v. Dickinson, 289 S. W. 2d 533. Miller, Martin, Hitching & Tipton of Chanttanooga, for plaintiff. George F. McCanless, Atty. Gen., Allison B. Humphreys, Sol. Gen. of Nashville and Milton P. Rice, Asst. Atty. Gen., for defendants.

state legislation

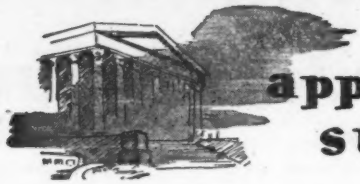
Massachusetts — Chapter 607 amends subsection (c) of section 5 of Chapter 62 of the General Laws to provide that net capital losses from intangibles may be carried over and applied to reduce net capital gains from the same sources in each of three succeeding taxable years to the extent that such amount exceeds any net capital gain of any taxable year intervening between the taxable year in which the net capital loss arose and such succeeding taxable year. The act is applicable to net capital losses recognized in taxable years beginning after December 31, 1955.

Virginia — A new Corporation Law, the "Virginia Stock Corporation Law," patterned generally after the American Bar Association's Model Act, which will become effective on January 1, 1957, has been enacted by Chapter 428, Laws of 1956.

In 1957 and thereafter, the Annual Reports of domestic and foreign corporations will be required to be filed with the State Corporation Commission "between the first day of January and the first day of March of each year after the calendar year in which it was incorporated or authorized to conduct affairs in this State." (Sec. 13.1-283, Chapter 428, Laws of 1956, effective January 1, 1957.)

Extending Corporate Activities into New States

Counsel for corporations planning, near the close of the year, to extend their activities into new states, in which qualification is contemplated, usually give careful consideration to the dates on which qualification is to be effected. It has been found, in many instances, that if qualification and the carrying on of instrastate activities, are deferred until after January 1, there may be savings of taxes which would otherwise be due early in the new year. Also, the preparation and filing of certain tax returns, due early in the new year if qualification and business activities occur prior to January 1, may be postponed for approximately a year, if these steps are delayed until after the new year begins.



appealed to the supreme court

The following cases previously digested in The Corporation Journal have been appealed to The Supreme Court of the United States.*

ALABAMA. Docket No. 505. *State v. Plantation Pipe Line Co.*, 89 So. 2d 549. (The Corporation Journal, December 1956—January 1957, page 294.) State franchise tax—pipe line company—interstate commerce. **Petition for writ of certiorari filed, October 11, 1956.**

ARKANSAS. Docket No. 51. *Leslie Miller, Inc. et al. v. The State of Arkansas*, 281 S. W. 2d 946. (The Corporation Journal, February—March, 1956, page 192.) Contractors' state license—government contracts—federal areas. **Appeal filed, March 23, 1956. Probable jurisdiction noted and case transferred to summary calendar, May 28, 1956.**

CALIFORNIA. Docket No. 99. *Pacific Western Oil Corporation v. Franchise Tax Board*, 289 P. 2d 287. (The Corporation Journal, August—September, 1956, page 255.) Income tax—income from intangible assets—commercial domicile in California. **Appeal filed, May 21, 1956. October 8, 1956:** "*Per curiam*: The motion to dismiss is granted and the appeal is dismissed. Treating papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied."

LOUISIANA. Docket No. 409. *Mississippi River Fuel Corporation v. Fontenot, Collector of Revenue*, 234 F. 2d 898. Severance tax—oil and gas—severed from land leased from Federal government. **Petition for writ of certiorari filed, September 12, 1956.**

MICHIGAN. Docket No. 354. *Panhandle Eastern Pipe Line Co. v. Michigan Corporation and Securities Commission et al.*, 77 N. W. 2d 249. (The Corporation Journal, October—November, 1956, page 274.) Franchise tax—apportionment formula—basis. **Petition for writ of certiorari filed, August 29, 1956. Petition for certiorari denied, November 5, 1956.**

MISSISSIPPI. Docket No. 226. *McWilliams Dredging Company v. McKeigney*, 86 So. 2d 672. (The Corporation Journal, August—September, 1956, page 256.) Income tax—specific accounting. **Appeal filed, July 2, 1956. Motion to dismiss granted and appeal dismissed for want of a substantial Federal question, October 8. 1956.**

PENNSYLVANIA. Docket No. 531. *Commonwealth of Pennsylvania v. Eastman Kodak Company*, 124 A. 2d 100. (The Corporation Journal, October—November, 1956, page 275.) Corporation Income Tax Act of 1951—application to foreign corporation having no property, office or place of business in state and engaged only in interstate commerce. **Petition for writ of certiorari filed, October 27, 1956.**

WASHINGTON. Docket No. 214. *Field Enterprises, Inc. v. Washington*, 289 P. 2d 1010. (The Corporation Journal, October—November, 1956, page 276.) Business and occupation tax—interstate commerce. **Appeal filed, June 28, 1956. October 8, 1956:** "*Per curiam*: The judgment is affirmed. Norton Company v. Department of Revenue of Illinois, 340 U. S. 534. Mr. Justice Frankfurter and Mr. Justice Harlan are of the opinion that probable jurisdiction should be noted."

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* Data compiled from **CCH U. S. Supreme Court Bulletin, 1956-1957.**

regulations and rulings

Arizona — Although the business of a manufacturer is not taxable under the Gross Income (Sales) Tax, as such, when the manufacturer sells at retail its products within the state, even though the buyer may not be a resident of the state, nevertheless the gross proceeds from such sale are taxable, and when the manufacturer sells the products to a buyer outside the state, then the gross proceeds are exempt from the tax. (Opinion of the Attorney General, State Tax Reporter, Arizona, ¶ 65-011.)

A domestic corporation which merges with a foreign corporation which is not qualified in Arizona need not file releases from the State Tax Commission before withdrawing from the state. The only provisions which a domestic corporation must comply with before merging or consolidating with a foreign corporation are those set out in Article 5, Chapter 53, Arizona Code of 1939. Article 5 does not require a domestic corporation to comply with Section 73-1323, which authorizes the Corporation Commission to withhold issuance of a certificate of dissolution or withdrawal until receiving notice from the State Tax Commission that all sales taxes have been paid. (Opinion of the Attorney General, State Tax Reporter, Arizona, ¶ 4-003.)

Idaho — Subcontractors and specialty contractors must be licensed as public works contractors in order to submit bids to a general contractor or to the state, county, city, town, village, school district, or to any other taxing subdivision. A general contractor need not submit a full list of his subcontractors at the time of the original submission of his bid proposal. (Opinion of the Attorney General, State Tax Reporter, Idaho, ¶ 34-007.)

North Carolina — A foreign corporation which maintains a sales office in North Carolina for purposes of direct order-taking from customers and investigation of customer complaints, in addition to maintaining a convenience for its salesmen, is doing business in the state within the meaning of the income tax statutes. (Opinion of the Attorney General, State Tax Reporter, North Carolina, ¶ 200-140.)

A Pennsylvania manufacturing corporation which has an agency agreement with a Georgia corporation to sell its product through travelling salesmen in North Carolina would be required to domesticate in North Carolina and pay the state's franchise and income taxes, where the manufacturer maintains a stock of "consigned" goods in the state and the debt incurred by the purchaser is directly to the manufacturer, as the sales would be sales by the Pennsylvania corporation of its goods from a storage warehouse located in North Carolina. (Opinion of the Attorney General, State Tax Reporter, North Carolina, ¶ 200-135.)

some important matters

For December and January

This Calendar does not purport to be a *complete* calendar of all matters requiring attention by corporations in any given state. It is a condensed calendar of the more important requirements covered by the *State Report and Tax Bulletins* of The Corporation Trust Company. Attorneys interested in being furnished with timely and complete information regarding *all* state requirements in any one or more states, including information regarding forms, practices and rulings, may obtain details from any office of The Corporation Trust Company or C T Corporation System.

Alabama — Annual Application Fee for permit to do business due February 1.

Alaska — Annual Corporation Tax due on or before January 1.

Arizona — Quarterly Withholding Tax due on or before January 31.

Colorado — Quarterly Withholding Tax due on or before January 31.

Delaware — Annual Report due on or before first Tuesday in January.—Domestic Corporations.

Withholding at Source Returns due January 31.—Corporations paying compensation to Delaware employees.

District of Columbia — Annual Report published and filed between January 1 and January 20.—Domestic Corporations formed under 1901 Act.

Application for license in connection with District Franchise (Income) Tax due before January 1.

Georgia — Annual License Tax Report due on or before January 1.

Indiana — Information and Withholding Returns due on or before January 31.

Iowa — Quarterly Retail Sales Tax due on or before January 31.

Kentucky — Quarterly Withholding Tax due on or before January 31.

Louisiana — Annual Report due February 1.—Domestic Corporations.

Maryland — Returns of Information at the source and Quarterly Withholding Tax due on or before January 31.

Missouri — Annual Franchise Tax due on or before December 31.
Quarterly Retail Sales Tax due on or before January 15.

New Hampshire — Annual Maintenance Fee due on first business day of January.—Foreign Corporations.

North Dakota — Quarterly Retail Sales Tax due on or before January 31.

Oregon — Quarterly Withholding Tax due on or before January 31.

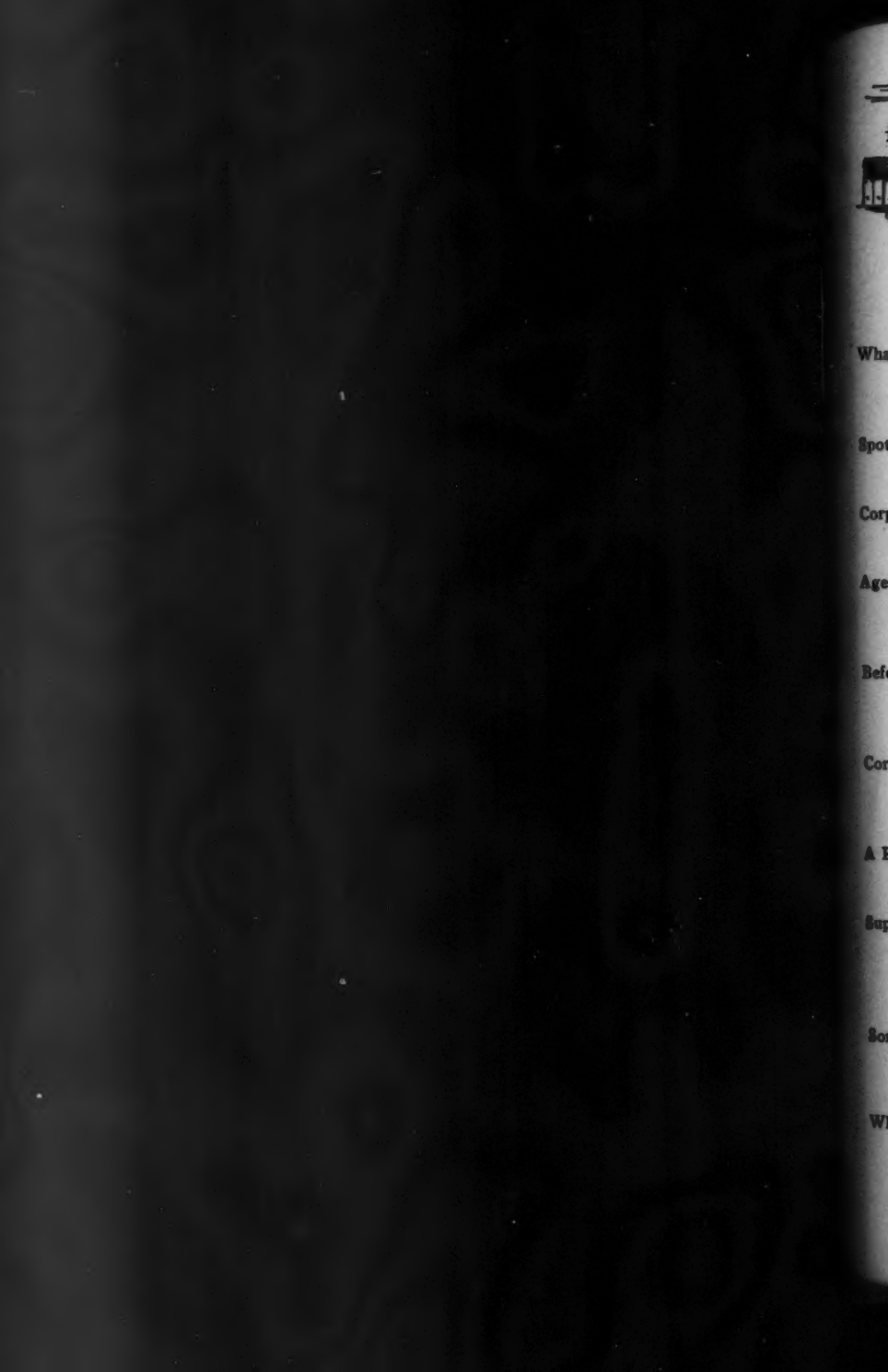
South Carolina — Annual Statement due January 31.—Foreign Corporations.

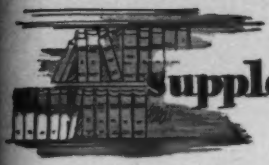
South Dakota — Quarterly Retail Sales Tax due on or before January 15.

Utah — Quarterly Retail Sales Tax due on or before January 30.

Vermont — Quarterly Withholding Tax due on or before January 31.

West Virginia — Annual Business and Occupation (Gross Sales) Tax due January 31.





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Agent for Process. Case histories of corporation officials who suddenly found out that trouble can take funny bounces when statutory representation is entrusted to a business employee.

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Corporate Confusion. A discussion of the wriggling, twisting, seemingly opposite court decisions which make building a pattern for out-of-state operations by a corporation a risky business these days.

A Pretty Penny . . . Gone! What it can cost a corporation—as shown by actual court cases—if its agent cannot be found when service of process is attempted.

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